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IN THE

Supreme Court of the United States

1968

BIG RUN COAL & CLAY COMPANY, - - Petitioner,

VS:

NATIONAL LABOR RELATIONS BOARD, - Respondent.

PETITION FOR CERTIORARI

TO REVIEW A DECISION OF
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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PETITION FOR CERTIORARI

To Review a Decision of
The United States Court of Appeals
For the Sixth Circuit

STATEMENT OF THE CASE

This case is before the Court on the Big Run Coal & Clay Company's Petition for Certiorari, pursuant to Rules 19 and 23, to review a decision of the United States Circuit Court of Appeals for the Sixth Circuit granting enforcement of an Order of the National Labor Relations Board, and a subsequent Order of that Court overruling the Respondent's Petition for Rehearing. These Orders of the Court are not reported; the Decision and Order of the Labor Board are reported at 152 NLRB No. 120. Copies of these Orders of the Court and Labor Board are appended to this Petition.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The grounds on which the jurisdiction of this Court is invoked are that the Circuit Court of Apeals has rendered a decision in conflict with the decision of another Circuit Court, and in conflict with applicable decisions of this Court.

The Opinion and Order of the Circuit Court of Appeals was entered November 13, 1967, a Petition for Rehearing was filed by Respondent and an Order overruling the Petition for Rehearing was entered February 8, 1968.

STATUTE CONFERRING JURISDICTION ON THE SUPREME COURT

Jurisdiction to review the judgment in question is believed to be conferred on the Supreme Court by 28 U. S. C. A. Section 1254, 62 Statutes 928, and Rule 19 of the Supreme Court.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

1. WHETHER THE EMPLOYER SHOULD BE REQUIRED TO SIGN AN ALLEGED COLLECTIVE BARGAINING CONTRACT WHICH WAS INCOMPLETE IN FORM, OMITTED PROVISION FOR EXECUTION BY A CONTRACTING PARTY, AND WHICH WAS NEGOTIATED AT A TIME WHEN THE UNION'S REPRESENTATIVE KNEW THAT ALL THE EMPLOYEES IN THE BARGAINING UNIT HAD WITHDRAWN FROM THE UNION BUT CONCEALED THAT FACT FROM THE EMPLOYER'S REPRESENTATIVES.

2. WHETHER IN ANY EVENT, THE EMPLOYER SHOULD BE REQUIRED TO CONTINUE BARGAINING WITH THE UNION AFTER THE UNION HAD LOST ITS ENTIRE MEMBERSHIP IN THE PLANT, BY VOLUNTARY DEFECTION OF ALL THE EMPLOYEES WITHOUT FAULT OR PROCUREMENT BY THE EMPLOYER, THERE BEING NO CHARGE IN THE COMPLAINT OR PROOF OFFERED OF ANY FAULT OR PROCUREMENT BY THE EMPLOYER.

Concisely summarized, the essential facts are as follows: page references are to the printed copy of the record filed as an Appendix to the Labor Board's brief in the Circuit Cort and which is in the record of this Court.

The employer operates a small brick plant in Lexington, Kentucky, with 27 employees (General Counsel Exhibit 1-a, Appendix 50a). Following the Union's winning a representation election, the Union was certified as the bargaining agent and bargaining sessions commenced on July 27th, nine sessions being held between that date and November 4, 1963 (appendix 4a). Prior to the commencement of these meetings, Mr. Poske, International Representative of the National Union, wrote the Company on July 8, 1963 (General Counsel's Exhibit No. 9, Appendix 49a), stating that:

> "The Union further requests that employees of your Company who have been selected as wage committeemen and Local President be granted time off from their duties for the purpose of these negotiations."

At the first bargaining session Mr. Poske presented

a proposed form of contract as the basis for negotiations (General Counsel's Exhibit 2, Appendix 63a), in which the contracting parties were stated as follows:

> "ARTICLE I, AGREEMENT.
>
> This Agreement is between Big Run Coal & Clay Company for its Lexington, Kentucky plant (hereinafter called the Company) and the United Glass and Ceramic Workers of North America, AFL-CIO-CLS and Lexington Local No. 425 (hereinafter called the Union)."

The Committee from the Local Union, whose participation Mr. Poske had requested for the purpose of the negotiations, attended the first eight sessions with Mr. Poske (Appendix 4a). However, at the start of the ninth meeting, on November 4th, only Mr. Poske appeared. On inquiry as to the reason for the absence of all members of the Committee from the Local Union, he refused to explain their absence or to answer any questions with respect to them. (Appendix 45a). He later, at the hearing before the Labor Board's Hearing Officer, admitted that at that time he knew that all the employees had withdrawn from the Union and that he had no membership in the plant, and had been notified by them that they did not want him to bargain for them, (appendix 46a).

During the adjournment for lunch, the employer's representative obtained information that an officer of the Local Union had, shortly before the meeting, made the statement that all the employees had withdrawn from the Union. On reconvening the meeting after lunch, when Poske was advised of this situation he again refused to answer any questions or either to confirm or deny this rumored loss of membership, (General Counsel Exhibit 4, Appendix 65a).

This action by Poske placed the employer's representative in the position of being obligated to continue bargaining with Poske if in fact he still had a majority of the employees in the unit as members of the Union, but of being relieved of any duty to bargain further with him if, without the Company's fault, the Union had in fact lost its majority in the plant, and especially if the entire membership had defected.

Also, being unable under the law to interrogate any of the employees as to their then membership or non-membership, the Company, to avoid a possible Unfair Labor Practice by refusing to bargain further if Porke was actually entitled to bargain, accepted his demand to that effect, (General Counsel Exhibit, Appendix 65a). As both Poske, the Company's attorney, and the Federal Conciliator present, all lived at considerable distances from Lexington, where the meetings were being held, the Company representatives agreed to bargain further, making the reservation that any form of contract negotiated must be later approved by the Local Unian, which was designated in the Union's proposal as one of the three contracting parties (43a).

The National Union's Representative, Mr. Poske, as shown above, had procured the Company to give the Local Union Committee time off "for the purpose of these negotiations" and had conducted the negotiations on the basis of a three-party form of contract proposed by him. The Company President, Mr. Coleman, testified (Appendix 39a) that in the meetings prior to November 4th "we had been negotiating with them" and Mr. Poske himself testified, on direct examination of Board counsel, (Appendix 43a) as follows:

"Q. Are you the same Mr. Poske referred to earlier in these proceedings as having participated in

the negotiating committee with the Big Run Coal and Clay Company?

A. Yes, sir."

Further, on cross-examination, being asked whether he ever informed the Company representative that the Local Committee was not authorized to negotiate, Mr. Poske presented the eleventh-hour alibi that (Appendix 47a):

"This matter never came up. I came to the table with certain people, and as I said before, they were there as a matter of public relations as far as the Local was concerned, and also there to lend their assistance, but I was there as the sole negotiator for the Union."

ARGUMENT

THE EMPLOYER WAS ENTITLED TO REQUIRE EXECUTION OF THE CONTRACT BY ALL CONTRACTING PARTIES.

The Union first made the Local a party to the contract proposed by it, procured the Company Representatives to negotiate jointly with himself and the Local's Committee on that basis for the first eight bargaining sessions and repudiated his previously accepted proposal at the final meeting of November 4th only after being notified that the membership had defected.

The question of good faith bargaining with respect to matters which the Act does not make mandatory subjects of bargaining was fully considered by this Court in *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 365 U. S. 342, 2 L. Ed. 2nd 823, where an employer proposed a form of contract which required a pre-strike vote of the employees by secret ballot to which the Union representatives refused to agree. In the absence of such agreement, the employer's insist-

ence constituted refusal to bargain in good faith. However, the Court's opinion further stated (350) that:

> "We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects which are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory subjects. Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the Union."

There is no question that a Union may voluntarily elect to make the Local Union a contracting party jointly with the National Union certified as the bargaining agent, or even to make the Local Union the sole contracting party with the employer. The records of this Court contain a multitude of cases in which this was done. If either the employer or the National Union propose such a form of contract and the other party agrees to that proposal, that agreement is binding.

Section 8 (d) of the Act imposes on employers and labor organizations the duty to execute a "written contract incorporating any agreement reached if requested by either party." The statute does not differentiate between "substantive" terms of a contract or other terms which are essential to a complete contract, nor does it define what constitutes a "substantive" term. On its face, the statute contemplates a complete "agreement" before an obligation to reduce the agreement to writing is imposed.

It is elemental that the designation of the contracting parties is essential to complete agreement on a contract.

In the original leading decision on the duty of the

parties to reduce an agreement to writing, *Heinz* v. *N. L. R. B.*, 311 U. S. 515, 85 L. Ed. 309 (in which counsel for Petitioner here was of counsel), there was no dispute as to who would constitute the parties to the agreement. Also, as stated in the opinion (516), the Board's order sought to be enforced required the employer, among other things,

> "to recognize and bargain collectively with the Canning and Pickle Workers Local, Union No. 325 a labor organization affiliated with the American Federation of Labor."

Likewise, in the other cases cited by Board Counsel in the Circuit Court, *Standard Oil Co.* v. *N. L. R. B.*, 322 Fed. 2nd 40, 45 CA 6); *N. L. R. B.* v. *Waite, Inc.*, 310 Fed. 2nd 700, (CA 6); *N. L. R. B.* v. *Todd Co.*, 173 Fed. 2nd 705, 707, (CA 2), cert. den. 330 U. S. 864; and *Lonzano Enterprises* v. *N. L. R. B.*, 327 F. 2nd 814, 818-819 (CA 9), so far as those opinions disclose there was no disagreement as to any provisions of the agreement, including who were the contracting parties. Here, the Union's representative, Poske, himself at the outset specified who were the contracting parties with whom the Company was asked to negotiate. He presented to the Company representatives at their first meeting, a draft of a proposed contract (General Counsel Exhibit 2, (27), in which he specified that,

> "This agreement is between Big Run Coal & Clay Company for its Lexington, Kentucky, plant (hereinafter called the Company) and the United Glass and Ceramic Workers of North America, AFL-CIO-CLC and Lexington Local No. 425, (hereinafter called the Union)."

His draft also contained no signature page and hence there was no intimation during the bargaining sessions that the negotiations were on any other basis than as proposed by him.

It is the position of the Petitioner that the Union's proposal to make the Local Union a party to the three-party contract offered by it had in good faith been accepted by the employer and that under these circumstances the employer was entitled to the enforcement of that agreement.

The opinion of the Sixth Circuit in the present case relies wholly on their previous recent opinion in *Houchens Market* v. *N. L. R. B.*, C. A. 6, 1967, 375 Fed. 2nd 208. Actually, the facts in that case do not sustain the Court's ruling here, but to the contrary, support the Petitioner's position. In the *Houchens* case, after four months of bargaining, the Company attorney presented the Union a proposed form of contract between the Company and the International Union only, electing not to include the Local Union. After the Union had accepted this proposal, the Company attorney later attempted to repudiate his proposal and require ratification by the Local Union.

Under these circumstances, the Court refused to allow the Company to repudiate its own proposal which had been accepted by the Union. However, the opinion further noted that, while not a subject of mandatory bargaining, such a proposal would be legal and, if accepted, would be binding, citing *N. L. R. B.* v. *Borg-Warner*, 356 U. S. 342 (349).

THERE WAS NO OBLIGATION IN ANY EVENT ON THE EMPLOYER TO BARGAIN WITH MR. POSKE AFTER ITS EMPLOYEES HAD WITHDRAWN FROM THE UNION.

While this is the really substantial issue in this case, and which was presented by the pleadings and argued at length by counsel for both parties in the Circuit

Court, that Court, as is shown by its Opinion, for some reason refused to pass on the issue so raised and which was material to the employer's defense.

In the Trial Examiner's Report and Recommendations, which were adopted by the Board on review, he on this issue cited *Brooks* v. *N. L. R. B.*, 348 U. S. 96, 99 L. Ed. 125 (1954); *N. L. R. B.* v. *Henry Heide, Inc.*, 219 Fed. 2nd 46, 47-48. (CA 2), Cert. denied, 348 U. S. 952; and *N. L. R. B.* v. *Wooster Davision of Barg-Warner Corp.*, 356 U. S. 242, above discussed.

These cases are readily distinguishable from the case here before the Court. In the *Heide* case the Board found as a fact that the employer never at any time bargained with the Union in good faith, but was dealing with a rival Union and simply "stalling" until the year ran out, to gain time to determine the certified Union.

In *Brooks* v. *N. L. R. B.*, supra, decided in 1954, the employer had refused to bargain with the certified Union at the time the certification was issued and at all times thereafter. He never at any time bargained with the Union, in good faith or at all.

Subsequently, in *N. L. R. B.* v. *Florida Citrus Canners Co-op*, (CA 5), 228 Fed. 2nd 630 (1961) a case where, as here, there had been a number of good faith bargaining sessions; in that case the Board found that after certification of the Union on February 7th, the employer refused to bargain further on December 18th, nearly two months short of one year after certification. The Circuit Court's opinion states that,

> "We are convinced that it was not intended by the Congress that employees should be required to accede to a representation which they have re-

pudiated, in this case, by more than three-fourths of the bargaining unit. It might be said here, as this court has before said:

'If we should compel respondent to bargain further with this union, which the employees themselves have obviously repudiated, the result would be to deny them the right, secured by the Act, to bargain through the representative of their choice.' N. L. R. B. v. Mayer, 5th Cir. 1952, 196 F. 2d 286 (21 LC Par. 66,931).

We do not think the rule requires an employer to bargain with a union which has demonstrably lost its majority and where the filing of a petition for decertification would be futile. N. L. R. B. v. Swan-Hosier Mills, 5th Cir. 1952, 195 F. 2d 350 (21 LC Par. 66,878), Cert. den. 344 U. S. 863, 73 S. Ct. 103, 97 L. Ed. 699."

The Supreme Court later (7 L. Ed. 2nd 829, 269 U. S. 304) reversed the Circuit Court's additional ruling on the separate question of the weight of the evidence necessary to sustain a Board Order for reinstatement with back pay. The Supreme Court's opinion did not discuss, and left in effect, the Circuit Court's holding that the employer was not required to bargain further with the Union.

The present decision of the Sixth Circuit is also inconsistent with their own recent holding in *Philip Cary Mfg. Co.* v. *N. L. R. B.*, 331 Fed. 2nd 720, 49 L.C. 8,885. In the Cary case, as here, the parties conducted eleven bargaining sessions over a period of several months following the certification. In that case the Union then struck the plant and later, after notice, the employers brought in new employees replacing a number of the strikers. The Court later held that the employer was guilty of an unfair labor practice in refus-

ing to reinstate certain of the strikers and required their reinstatement with back pay.

Nevertheless, on the question of the employer's duty to bargain further, the Court refused to enforce the Board's order. After pointing out that the Union had won the election by the bare majority of 122 to 112, the Court held:

> "In the light of the large number of strikers who were permanently replaced, there would be substantial ground for doubt concerning the Union's majority status. (Citing cases).
>
> Since the Company had well-founded doubts about the Union's majority status, it would have been refused to bargain at the expiration of one year after the Union's certification. Brooks v. N. L. R. B., 27 LC 68,835, 348 U. S. 96 . . . (Citing additional cases).
>
> This assumes, as was true in this case, that the Company did not commit an unfair labor practice which was responsible for the Union's loss of majority. N. L. R. B. v. Superior Fireproof Door & Sash Co., 289 Fed. 2nd 713; N. L. R. B. v. Florida Citrus Canners Co-operative, 288 Fed. 2nd 630, 638, rev. and reman., 369 U. S. 404, initial decision aff'd, 311 Fed. 2nd 541."

After noting that the General Counsel was contending that the Company's failure to continue bargaining during the last two and one-half months of the certification year was an unfair labor practice, the Court further held that:

> "That Board's order, under the facts of this case, overlooks two practical and important facts. First, with the withdrawal of its super-seniority proposal on August 10, 1961, the Company resumed good faith, bargaining, meeting twice with the Union, without result, before the hearing in this

case began on October 3, 1961. Secondly, we are faced with the Union's obvious loss of its majority status. A realistic view of the situation demonstrates the futility of requiring the Company to continue negotiations with this Union, Perry Coal Co. v. N. L. R. B. (42 LC, 16,981), 291 F. 2d 126, 128 (C.A. 7); N. L. R. B. v. Florida Citrus Canners Co-operative, supra, unless and until the Union has been duly certified as bargaining representative following a new election, N. L. R. B. v. Superior Fireproof Door & Sash Co., supra.

It is appropriate to note here a statement by Judge Friendly in the *Superior Fireproof Door* case:

> "Nor may we forget that the interests to be protected are primarily those of the employees, importantly including, of course, their right to effective representation, rather than of the union itself. (42 LC, 16,857) 289 F. 2d at 724. In view of the lengthy good faith bargaining which has transpired, the expiration of the certification year, and the Union's loss of its majority status, we hold that the Company is no longer required to bargain with this Union. This part of the order of the Board is set aside and enforcement of the Board's order in this respect is denied."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Certiorari be granted and that the decision of the Circuit Court of Appeals be reviewed on its merits.

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